88-686

NO._____

Supreme Court, U.S.
FILED
OCT 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1988

GRACIANO D'ANDREA,

Petitioner,

-vs-

BANK OF AMERICA NY&SA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL, STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

Richard E. Rader
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Attorney for Petitioner

QUESTION PRESENTED

When the allegations of an action for damages for wrongful termination of employment would entitle the plaintiff to recover under several theories recognized by state law, does the fact that they would also entitle him to equitable relief in an action under ERISA preempt the action to federal jurisdiction?

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SUPREME COURT OF THE UNITED STATES

October Term 1988

GRACIANO D'ANDREA,

Petitioner,

-vs-

BANK OF AMERICA NY&SA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeal of the State of California for the Second Appellate District, Division Six.

OPINION BELOW

A copy of the opinion of the Court of Appeal appears in the Appendix, together with copies of orders by the California

Supreme Court, first granting and then denying review.

JURISDICTION

The Court of Appeal filed its original opinion June 6, 1986. Review was granted by the California Supreme Court September 25, 1966, but on April 7, 1988 it transferred the case back to the Court of Appeal with instructions. The Court of Appeal refiled its opinion May 12, 1988. A timely petition for review was denied by the California Supreme Court July 27, 1988. This Court has jurisdiction under 28 U.S.C. §1257(3).

ENACTMENTS INVOLVED

ERISA (29 U.S.C. §§1001 et seq.)

STATEMENT OF THE CASE

His complaint alleges that petitioner devoted 31 years to respondent's service in reliance on promises that he would not be

discharged except in good faith and for just cause, and that upon retirement he would be paid a substantial pension for life; that in breach thereof he was discharged without just cause and in bad faith in order to avoid payment of the promised pension.

Respondent moved for summary dismissal on the ground that ERISA prohibits employers from discharging employees for the purpose of preventing them from attaining elegibility for plan benefits [29 U.S.C. §1140], that the Act provides an action for equitable redress for such violations [§1132(a)(3)(B)(i)], and federal courts have exclusive jurisdiction of such actions [§1132(e)].

Respondent argued that equitable relief under ERISA is petitioner's sole remedy, citing Johnson v. Trans-World Airlines (1983) 149 Cal.App.3d 518 as authority. The trial court had to follow Johnson, and the Court of Appeal affirmed.

The California Supreme Court granted

review, but 19 months later sent the case back to the Court of Appeal with instructions to refile its original opinion with "appropriate reference" to Pilot Life Insurance Co. v. Dedeaux (1987) 481 U.S. ___[109 S.Ct. 1549; 95 L.Ed.2d 39] and Sorosky v. Burroughs (9th Cir. 1987) 826 Fed.2d 794.

The present opinion was filed by the Court of Appeal and a petition for review, asserting that nothing in Pilot Life authorizes such a result and Sorosky flatly contradicts the proposition for which it is cited, was denied by the California Supreme Court. The state court action is now final, the remittitur having issued August 22, 1988.

WHY THE WRIT SHOULD ISSUE

On at least two occasions when it would have been appropriate to do so, this Court has declined an opportunity to set the parameters of ERISA preemption of state tort actions. Alessi v. Raybestos-Manhattan, Inc.

(1981) 451 U.S. 506, 68 L.Ed.2d 402, 101 S.Ct. 1895, 1907; Shaw v. Delta Airlines, Inc. (1983) 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890, 2901-2 [fn. 21].

The California Supreme Court has now found guidance on that question in Pilot Life, a case involving state common law tort and contract action "asserting improper processing of a claim for benefits under an insured employee benefit plan." 95 L.Ed.2d at 45.

It would have been astonishing if the type of action in Pilot Life were not pre-empted, since it involved conduct so closely involved in the administration of an ERISA-governed pension plan. But absolutely nothing in that opinion so much as hints that actions for tortious discharge, based upon state-recognized theories having absolutely nothing to do with pension plan administration, are also preempted. If, as the California Supreme Court claims, there is authority in that opinion for that proposition, it is well hidden.

The Ninth Circuit has formulated a logical, common sense, understandable and useful test for determining ERISA preemption. In Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499 the court reasoned that preemption depended upon whether the challenged conduct was part of the administration of an employee benefit plan. Thus, a claim that benefits already due under a plan have been denied or lost is preempted, but if prospective benefits are lost because the employer's tortious conduct prevented the plan from ever coming into existence, the claim is not preempted.

In Sorosky that test was applied to circumstances much like those at bench. Sorosky alleged, as has petitioner, discharge to prevent him from qualifying for a pension. The court ruled that claim was preempted. But he also alleged, as has petitioner (see p. A 25 of the Appendix), that he was discharged without good cause and in bad faith, in

breach of the covenant of good faith and fair dealing that is implied by law into every contract. Those "theories" of recovery are independent of the benefit plan, and therefore are not preempted. 826 Fed.2d at 800.

The reasoning of the Sorosky court is logical and persuasive. An employer who fires employees to avoid pension payments runs afoul of ERISA, and if the employees want to enforce their pension rights they must do so in federal court. But the employer might at the same time and by the same act violate other employee rights not dependent upon nor related to ERISA, and as to those transgressions the employer can be assessed damages in a state court if that state recognizes such a cause of action.

To state the proposition another way, discharge without good cause, for example, subjects an employer to liability in damages in California and can be established without ever proving the employer's actual and malig-

nant motive, which might well be something prohibited by ERISA. That cause of action is not dependent upon conduct proscribed by ERISA and therefore is not preempted.

It is a concept that not every court has grasped, possibly because this Court has not spelled it out as gospel.

Petitioner respectfully suggests that it is time for the Court to do so. There is, unfortunately. tremendous pressure on state courts nowadays to find relief from the burgeoning litigation that is clogging judicial systems throughout the land. Perhaps the temptation to get rid of cases is such that no state court cares to analyze too closely the need for or propriety of acceding to federal preemption.

But can the federal system afford and accommodate the grand-scale injection of state litigation into its already straitened workload? And is it fair - is justice served - by barring tortiously discharged em-

ployees from the courts in their own communities?

Wherefore, petitioner prays that the Court issue a writ of certiorari, review the opinion below, and formulate a workable test for determining ERISA preemption of actions for wrongful discharge.

Respectfully submitted,

Richard E. Rader
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 1988 3 copies of the within Petition were mailed to respondent's counsel, postage prepaid, addressed to:

Schachter, Kristoff, Ross, Sprauge & Curiale
101 California Street - Suite 2900
San Francisco, CA 94111

I further certify that all parties required to be served have been served.

Richard E. Rader

APPENDIX

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GRACIANO D'ANDREA,	)	2d Civil No.
	)	B00949 (Super
Plaintiff and	)	Ct. No. 69472)
Appellant,	)	(Ventura County)
	)	
v.	)	COURT OF APPEAL -
	)	SECOND DISTRICT
BANK OF AMERICA	)	FILED
NATIONAL TRUST AND	)	May 12, 1988
SAVINGS ASSOCIATION,	)	Robert N. Wilson,
	)	Clerk
Defendant and	)	
Respondent.	)	
	)	

This is an appeal by Graciano D'Andrea from the summary judgment entered in his suit for wrongful discharge and fraud. The trial court concluded that federal courts have exclusive jurisdiction over the subject matter of appellant's complaint pursuant to the Employee Retirement Income Security Act

of 1974 (ERISA). (29 U.S.C. Sec. 1001 et seq.) We affirmed. Subsequently, the California Supreme Court transferred the matter back to this court with directions to refile the opinion with appropriate citations to Pilot Life Insurance Co. v. Dedeaux (1987) 481 U.S. ___, [109 S.Ct. 1549; 95 L.Ed.2d 39] and Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794.

Appellant instituted this action in 1979, seeking general damages for breach of employment contract and fraud. Appellant claimed that respondent Bank of America had breached the parties' 1947 oral employment contract by terminating appellant's employment in 1978 for the purpose of defrauding him of retirement benefits. Respondent successfully demurred to the breach of contract cause of action in this complaint as well as in

appellant's Second and Third Amended Complaints on the ground that the cause was invalid under the Statute of Frauds.

In his Fourth Amended Complaint, appellant substituted the breach of contract theory for the theory of promissory estoppel. Respondent's demurrer to that cause of action was also sustained, but appellant was granted leave to file a Fifth Amended Complaint. In that complaint, appellant sued respondent for the torts of wrongful discharge and fraud, and sought compensatory and punitive damages. Both causes of action were based entirely on respondent's alleged wrongful denial of appellant's retirement benefits. Appellant complained that he had entered respondent's employ in reliance on respondent's representation that he would be furnished with a comfortable pension at the end of his career.

Alleging that he was dismissed by respondent for trumped-up charges of a conflict of interest, appellant expressly complained that the false accusations were made in bad faith for the sole purpose of depriving him of his promised pension.

After the case was set for trial, respondent filed a motion for summary judgment on the ground that the causes of action for wrongful discharge and fraud are subject to exclusive federal control under ERISA. Acknowledging its lack of subject matter jurisdiction over appellant's suit, the trial court granted respondent's motion.

DISCUSSION

Since the facts are not in dispute, this court's sole duty is to determine whether the judgment below was correct as a matter of law. (Larsen v. Johannes (1970) 7 Cal.App.3d 491, 496.) Statutory

and case law hold that the federal district court has exclusive jurisdiction over appellant's suit.

ERISA is a comprehensive federal scheme designed to protect the interests of participants in private employment benefit plans. (29 U.S.C. Section 1001(a).) One of its major concerns is the regulation of private pension plans. (29 U.S.C. Section 1001(c).)[1/] In

---

1/ That subdivision reads: "It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance."

We note that respondent's pension is not exempt from ERISA. Respondent is an employer within the meaning of 29 U.S.C. Sec. 1002(5) and 1003(a)(1), its pension plan is an "employee benefit plan" within the meaning of 29 U.S.C. Sec. 1002(3), and 1140, and appellant was a "participant" in respondent's pension plan pursuant to 29 U.S.C. Sec. 1002(7)-(8), and 1140.

regulating the area of employment benefit plans, ERISA establishes minimum requirements for participation and vesting, funding, fiduciary conduct and obligations and reporting and disclosure. To effectuate its protection policy, it also provides for criminal penalties (29 U.S.C. Sec. 1131, 1141)and access to federal courts through civil enforcement provisions (29 U.S.C. Section 1132).

It is settled that state tort claims of wrongful discharge and fraud, which refer to alleged denials of employment benefit plans, are preempted by ERISA,even if ERISA is not mentioned. (Johnson v. Trans World Airlines Inc. (1983) 149 Cal.App.3d 518, 524; Sorosky v. Burroughs Corp., supra, 826 F.2d 800.) Therefore, where the underlying facts of a complaint allege a matter which is controlled by ERISA, the

complaint states a cause of action under ERISA and the plaintiff has a sole federal claim to enforce his right to non-interference with his employment benefits. (Sorosky v. Burroughs Corp., supra.) (See also Provience v. Valley Clerks Trust Fund (1984) 163 Cal.App.3d 249; Authier v. Ginsberg (6th Cir. 1985) 757 F.2d 796, cert. den. (1985) ___ U.S. ___, [88 L.Ed.2d 177]; Blau v. Del Monte Corp. (9th Cir. 1984) 748 F.2d 1348, cert. den. (1985) Del Monte Corp. v. Blau, ___ U.S. ____, [88 L.Ed.2d 152]; Dependahl v. Falstaff Brewing Corp. (8th Cir. 1981) 653 F.2d 1208, cert. den .Falstaff Brewing Corp. v. Dependahl (1981) 454 U.S. 968; Folz v. Marriott Corp. (W.D.Mo. 1984) 594 F.Supp. 1007; Kelly v. International Business Machines Corp. (E.D.Pa. 1983) 573 F.Supp. 366, affd. (3rd Cir. 1984) 746 F.2d 1467; Gordon v. Matthew

Bender & Co., Inc. (N.D.Ill. 1983) 562 F.Sup. 1286; Maxfield v. Central States Health, Wel. & Pen. Funds (N.D.Ill. 1982) 559 F.Supp. 158.)

ERISA specifically preempts state laws relating to employment benefits. Section 1144, subdivision (a) provides that "the provisions . . . of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." Subdivision (c)(1) of section 1144 provides "[t]he term 'State Law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Section 1144 is to be construed broadly to preempt state laws, including state common law causes of action, which relate to employment benefit plans. (Alessi v. Raybestos-Manhattan, Inc. (1981) 451 U.S. 504, 525;

Authier v. Ginsberg, supra, 757 F.2d 799; Pilot Life Ins. Co. v. Dedeaux, supra, 481 U.S. ___, 95 L.Ed.2d 48.) A law "relates to" an employment benefit plan if it has a connection with or reference to such a plan. (Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 96-97; Pilot Life Ins. Co. v. Dedeaux, supra.) Accordingly, a state common law action brought for the purpose of remedying the denial or improper handling of an employment benefit plan relates to employment benefits and is expressly preempted by ERISA. (Folz v. Marriott Corp., supra, 594 F.Supp. 1021; Kelly v. International Business Machines Corp., supra, 573 F.Supp. 370; Pilot Life Ins. Co. v. Dedeaux, supra.)

Section 1140 of ERISA states in pertinent part that "[i]t shall be unlawful for any person to discharge,

fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . of an employee benefit plan . . . for the purpose of interfering with the attainment of any right to which such participants may become entitled under the plan. . . ." Thus, a state law claim of misconduct for discharging an employee for the sole purpose of depriving him/her of pension benefits clearly states a cause of action under section 1140, and is further preempted by federal law because Congress has already provided a remedy for this type of alleged conduct. (Johnson v. Trans World Airlines, Inc., supra, 149 Cal.App.3d 524-525; Folz v. Marriott Corp., supra, 594 F.Supp. 1021.)

Section 1132 of ERISA establishes that claims of tortious interference with pension rights are exclusively vested with the United State District Courts.

(Johnson v. Trans World Airlines, Inc., supra, p. 530.) Under section 1132, subdivision (e)(1), state courts have concurrent jurisdiction over civil actions only if the actions are brought under section 1132, subdivision (a)(1)(B).[2/] Subdivision (a)(1)(B) permits a state civil action to be brought by a participant of an employment benefit plan "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . ." A complaint that a discharge occurred for

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2/ Subsection (e)(1) provides: "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a participant, . . . State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

the sole purpose of depriving anemployee of job-related benefits cannot be construed as a civil action to enforce specific rights provided under an employment plan because the existence or nature of employment benefits is not being disputed. (Ibid.) As a result, such a complaint falls under exclusive federal court jurisdiction. (Ibid.) (See also Provience v. Valley Clerks Trust Fund, supra, 163 Cal.App.3d 261-262.)

The purpose of ERISA's preemption provisions is to establish pension plan regulation as an exclusive federal concern. (Pilot Life Ins. Co. v. Dedeaux, supra, 481 U.S. ___, 95 L.Ed.2d 46.) Congress further expressly stated its intent that ERISA's enforcement provisions are the exclusive remedy for any action relating to employment benefit plans. (Id., pp. 50-51, 52, 53-54.)

Consequently, the enforcement provisions of ERISA, sections 1132 and 1140, combined with its preemption provision contained in section 1144, expressly establish that a state common law claim of wrongful discharge for the single purpose of depriving an employee of employment benefits is a claim arising under federal law, as ERISA was enacted to regulate this problem. (29 U.S.C. Sec. 1001; Johnson v. Trans World Airlines, Inc., supra, 149 Cal.App.3d 528; Kelly v. International Business Machines, supra, 573 F.Supp. 371; Sorosky v. Burroughs Corp., supra, 826 F.2d 800.)3/

3/ The exception to ERISA's preemption proivisions provides that ERISA does not apply to State laws which "regulate insurance." (29 U.S.C. Sec. 1144(b)(2)(A), called the "saving clause.") In Pilot Life Ins. Co. v. Dedeaux, supra, the United States Supreme Court decided that State common law causes of action derived from general principles of tort and contract law (such as in the present case, wrongful discharge and fraud), cannot be said to be specifically directed toward the insurance industry because they can be applied to any contract and not only to insurance contracts. (95 L.Ed.2d 49-50.)

In the instant case, appellant pled that his alleged wrongful termination was accomplished for the sole reason that respondent did not wish to pay him retirement benefits. Since respondent's pension plan falls within the scope of ERISA (29 U.S.C. Sec. 1002(3), 1003(a), appellant's complaint is preempted by ERISA because it "relates to" respondent's pension plan. (See Sorosky v. Burroughs Corp., supra, p. 799.)

Moreover, appellant admits that his suit does not seek pension payments or an increase in such payments, nor that it alleges illegality in the terms and conditions of respondent's pension plan or that appellant became entitled to a particular pension. Since appellant thereby concedes that he is not seeking "to recover benefits due him under the terms of his plan, to enforce his rights under the

terms of the plan, or to clarify his rights to future benefits under the terms of the plan" (29 U.S.C. Sec. 1132(a)(1)(B)), the lower court had no jurisdiciton to adjudicate his claims. (Sec. 1132(e)(1).) (See also, Provience v. Valley Clerks Trust Fund, supra, 163 Cal.App.3d 261-262.)

In attempting to demonstrate that his complaint is not preempted by ERISA, appellant contends that the act does not mention, nor has the United States Supreme Court found, that ERISA provides the exclusive remedy for redressing employer misconduct. Appellant misses the point. ERISA provides the exclusive remedy for employer misconduct in those legal actions asserting tortious interference with employment benefit plans.

Furthermore, preemption of state law by federal law may be either express or

implied in federal statutory language and is thus compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. (Jones v. Rath Packing Co. (1977) 430 U.S. 519, 525.) As discussed earlier, sections 1144, 1140 and 1132 of ERISA are specific commands of preemption. (See 29 U.S.C. Sec. 1001(c), declaring that a policy of ERISA is to protect pension plan participants by requiring that plans vest accrued benefits of employees with significant periods of service (in appellant's case, 31 years).)

Appellant further argues that he is seeking redress for the termination of his employment and, therefore, his suit does not "relate to" an employment pension plan because it does not dispute the terms and conditions of respondent's

pension plan. This argument has no merit since appellant is complaining that his termination relates directly and solely to respondent's pension benefits.

Appellant finally contends that the rationale of Johnson v. Trans World Airlines, Inc., supra, 149 Cal.App.3d 518, is not sound. He state that it results in encouraging subterfuge in pleading by inviting complainants to forego mention of an employer's real motive for a wrongful discharge until a case gets to trial. This contention also has no merit. A complainant "cannot control which court has jurisdiction by virtue of the creativity of his pleading." (Id., pp. 525-526.)

Appellant also states that Johnson has a discriminatory effect. He contends that it disallows remedies provided by state law which are unavailable in

federal court in an action under ERISA, as well as barring wrongful discharge actions based on alleged violations of the covenant of good faith and fair dealing. (See Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311, 327-330.)

We recognize appellant's point that the burden of proof for a breach of California's implied-in-law covenant of good faith and fair dealing in private employment may be less stringent than proving a violation of ERISA. (But see Pugh v. See's Candies, Inc., supra, p. 330.) Unfortunately, the provisions of ERISA demand that his suit be maintained in federal court regardless of this perceived unfairness. There is no legal authority for the proposition that federal preemption may be prohibited or controlled by rights and remedies provided by state law. (See Loma Portal Civic

Club v. American Airlines, Inc. (1964) 61 Cal.2d 582, 591-593.)

Lastly, appellant contends that this court should overlook the Johnson case because it perceives ERISA as a scheme to supplant traditional state remedies for tortious misconduct and therefore uproots long-established rights. This contention is equally unavailing. Unlike actions for breach of contract, the field of employer-employee relations has not historically been left solely to state regulation. Further, the area of wrongful discharge based either on a contract or trot theory is a relatively new field, and not all states have recognized this right of action. (Annot. (1982) 12 A.L.R.4th 544, Sec. 1-4 and cases cited, and later cases (1985 pocket supp.) pp. 28-33.) Additionally, if we adopt appellant's reasoning, allowing concurrent

state actions in cases such as the present one would discriminate against participants in employment benefit plans on the basis of the location of their employment. (See Authier v. Ginsberg, supra, 757 F.2d 802.)

We conclude that the facts of appellant's complaint establish that the federal district court has exclusive jurisdiction over his suit pursuant to ERISA. Accordingly, the judgment is affirmed.

NOT TO BE PUBLISHED.

STONE, P.J.

We concur:

GILBERT, J.

ABBE, J.

Joe D. Hadden, Judge

Superior Court County of Ventura

Richard E. Rader for plaintiff and Appellant.

Schachter, Kristoff, Ross, Sprague & Curale, Morton H. Orenstein and Edward L. Kaufman for Defendant and Respondent.

ORDER GRANTING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second District, Division Six, No. B009494

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

D'ANDREA, Appellant,

v.

BANK OF AMERICA, Respondent

Appellant's petition for review GRANTED.

Bird, Chief Justice
Mosk, Associate Justice
Broussard, Associate Justice
Reynoso, Associate Justice

SUPREME COURT
FILED SEP 25, 1986
Laurence P. Gill, Clerk

No. L.A. 32252

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

D'ANDREA, Appellant,

v.

BANK OF AMERICA, Respondent

LUCAS, C.J. AND PANELLI, J., DID NOT PARTICIPATE.

The above-entitled cause is transferred to the Court of Appeal, Second Appellate District, Division Six, with directions to refile its opinion with appropiate citations to Pilot Life Insurance Co. v. Dedeaux (1987) ___U.S.___[107 S.Ct. 1549] and Sorosky v. Burroughs (9th Cir. 1987) 826 F.2d 794.

MOSK, Associate Justice
BROUSSARD, Associate Justice
ARGUELLES, Associate Justicr
EAGLESON, Associate Justice
KAUFMAN, Associate Justice

SUPREME COURT
FILED APR 7, 1988
Laurence P. Gill, Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 6, No. B009494

S006157

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

D'ANDREA

v.

BANK OF AMERICA, NT and SA

Lucas, C.J. and Panelli, J. did not participate.

Appellant's petition for review DENIED.

KAUFMAN, Acting Chief Justice

SUPREME COURT
FILED JUL 27, 1988
Laurence P. Gill, Clerk

EXCERPT FROM FIFTH AMENDED COMPLAINT

2. In 1947 plaintiff was interviewed for employment by defendant's officers and personnel supervisor. In order to induce him to enter defendant's employ, they promised that the employment would be permanent, and that he would not be discharged except for good cause and sufficient reason.

3. - - - he was assured and reassured by his superiors - - - on frequent occasion during the entire term of his employment, that his efforts were appreciated, that his job was permanent and quite secure from arbitray discharge - - -.

4. - - - the accusation [of misconduct by plaintiff] was made in bad faith for the purpose of discharging plaintiff before he became eligible for retirement on the promised pension.

FILED
NOV 22 1988
JOSEPH F. SPANIOL, JR.
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No. 88-686

In The

Supreme Court of the United States

October Term, 1988

GRACIANO D'ANDREA,

Plaintiff and Petitioner,

vs.

BANK OF AMERICA N.T. & S.A.,

Defendant and Respondent.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*[1] is the exclusive remedy for an employee who alleges that he was terminated solely to deprive him of retirement and pension benefits.[2]

---

[1] ERISA is a comprehensive federal statute which regulates pensions and other employee benefit plans. Section 2(a) of ERISA, 29 U.S.C. § 1001(a). ERISA protects the interests of participants in employee benefit plans, *inter alia,* providing for appropriate remedies, sanctions and ready access to the federal courts. Section 2(b) of ERISA, 29 U.S.C. § 1001(b).

[2] Petitioner misstates the issue in the case. The issue is not, as Petitioner contends, "when the allegations of an action for damages for wrongful termination of employment would entitle the Plaintiff to recover under several theories recognized by state law, does the fact that they would also entitle him to equitable relief in an action under ERISA preempt the action to federal jurisdiction?" (Petitioner's Opposition, p. i.) Rather, the issue stated by the California Court of Appeal is whether "[A] complaint that a discharge occurred for the sole purpose of depriving an employee of job related benefits . . . falls under exclusive federal court jurisdiction." (Court of Appeal Opinion, pp. 11-12).

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JURISDICTION

On May 12, 1988, the California Court of Appeal for the Second Appellate District, Division Six, rendered its decision affirming summary judgment on behalf of Defendant and Respondent Bank of America National Trust and Savings Association ("the Bank"). On July 27, 1988, the California Supreme Court denied Plaintiff and Petitioner Graciano D'Andrea's ("Petitioner") Petition for Review. Jurisdiction appears to be invoked by 28 U.S.C. § 1257(3) which provides, *inter alia*, that:

> Final judgments or decisions rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

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STATEMENT OF THE CASE

This case involves a claim by Petitioner in his Fifth Amended Complaint that he was wrongfully discharged by the Bank for the *sole purpose of denying him his retirement and pension benefits.* Based upon the settled principle that state law tort actions alleging terminations aimed solely at depriving an employee of pension benefits are preempted by ERISA, the Bank filed a Motion for Summary Judgment. The Court of Appeal affirmed the judgment. The California Supreme Court thereafter granted Petitioner's first petition for review. Subsequently, the California Supreme Court transferred the matter

back to the Court of Appeal with directions to refile the opinion with appropriate citations to *Pilot Life Insurance Co. v. Dedeaux*, 487 U.S. 41 (1987), and *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987). The Court of Appeal reaffirmed its earlier ruling, and upheld the lower court's grant of summary judgment. Petitioner again filed for review in the California Supreme Court. The Supreme Court denied Petitioner's petition for review. On or about October 24, 1988, Petitioner filed a Petition for Certiorari with this Court.

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SUMMARY OF ARGUMENT

The California courts properly ruled that, based on the preemption provisions of ERISA, they lacked jurisdiction over Petitioner's wrongful discharge and fraud claim.[3] All courts that have addressed this issue have held that terminations aimed at depriving employees of pension benefits are within the exclusive jurisdiction of the federal courts. Contrary to Petitioner's assertions, the deprivation of pension benefits is the essence of his claim, not merely an element of his damages.

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[3] Petitioner's fraud claim is based on the same operative facts as his claim for wrongful discharge. Petitioner claimed that Respondent terminated his employment for the purpose of defrauding him of retirement benefits. As the Court of Appeal noted, "Both causes of action were based *entirely* on Respondent's alleged wrongful denial of [Petitioner's] retirement benefits." (Court of Appeal Opinion, p. 3.)

ARGUMENT

Section 510 of ERISA (29 U.S.C. § 1140) expressly provides that it is unlawful to *discharge* or discriminate against a participant of an employee benefit plan "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . ." ERISA provides a remedy for violations of this section in Section 502(e) (29 U.S.C. § 1132(e)). Section 502(e) provides that,

> (1) . . . The district courts of the United States shall have *exclusive jurisdiction* of civil actions under this title brought by the Secretary or by a participant, beneficiary or fiduciary. (Emphasis added.)[4]

Courts have uniformly held that actions alleging conduct proscribed by Section 510 of ERISA are preempted

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[4] Under ERISA state courts have concurrent jurisdiction with the federal district courts only in those cases where a civil action is brought by a participant or beneficiary of an employee benefit plan "to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan." Section 502(a)(1)(B) of ERISA. (29 U.S.C. §§ 1132 (a)(1)(B).) Allegations of terminations aimed at depriving the employee of benefits, such as Petitioner's in the instant case, are within the exclusive jurisdiction of the federal courts because they are based on alleged violations of a *provision* of ERISA itself, (Section 510), rather than violations of the *terms* of a particular benefit plan. *Kross v. Western Elec. Co., Inc.*, 701 F.2d 1238, 1244 (7th Cir. 1983).

In this case, Petitioner concedes that he is not suing to recover benefits due to him under the terms of a plan covered by ERISA, or to clarify his rights to future benefits under the terms of the plan. "[A]ppellant admits that his suit does not seek pension payments or an increase in such payments, nor that it alleges illegality in the terms and conditions of respondent's pension plan or that appellant became entitled to a particular pension plan." (Court of Appeal Opinion, p. 14.)

by the Act, irrespective of the theory advanced. *See, Johnson v. Trans World Airlines, Inc.*, 149 Cal.App.3d 518 (1983); *Sorosky v. Burroughs, supra; Witkowski v. St. Anne's Hospital of Chicago, Inc.*, 447 N.E. 2d 1016 (1983) (Employee's complaint alleging wrongful discharge from employment solely to prevent her from participating in a long-term disability plan preempted by ERISA); *Gordon v. Matthew Bender & Co., Inc.*, 562 F.Supp. 1286 (N.D.Ill. 1983) (Complaint charging that plaintiff was fired ten months prior to becoming fully vested in employer's pension plan preempted by ERISA); *Kelly v. International Business Machines Corp.*, 573 F.Supp. 366 (E.D. Pa. 1983), *affd.*, 746 F.2d 1467 (3rd Cir. 1984) (Pennsylvania employee's pendent state claim for wrongful discharge in order to prevent her from receiving disability benefits preempted by ERISA); *Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds*, 559 F.Supp. 158 (N.D. Ill. 1982) (Illinois employee's state "retaliatory discharge" claim based on his age and his cooperation with Department of Labor in an ERISA-related matter preempted by ERISA); *See also, Pilot Life Insurance Company v. Dedeaux, supra; Dependahl v. Falstaff Brewing Corp.*, 633 F.2d 1208 (8th 1981), *cert. denied*, 454 U.S. 968 (1981); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985); *Blau v. Del Monte Corp.*, 748 F.3d 1348 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985); *Provience v. Valley Clerks Trust Fund*, 163 Cal.App.3d 249 (1984); *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir. 1985), *cert. denied*, 474 U.S. 888 (1985).

Petitioner contends that his common law tort causes of action for wrongful discharge and fraud are not pre-

empted by ERISA because they state claims that are "independent of the benefit plan." (Petition for Writ of Certiorari, pp. 5-8.) Petitioner asserts that his claim for pension and retirement benefits is but a theory of recovery. Petitioner mischaracterizes the gravamen of his complaint. "Alleging that he was dismissed by respondent for trumped-up charges of a conflict of interest, appellant expressly complained that the false accusations were made in bad faith for the sole purpose of depriving him of his promised pension." (Court of Appeal Opinion, p. 4.)

The California court concluded that Petitioner's wrongful discharge and fraud claim were based solely on the theory that he was terminated to deprive him of pension and retirement benefits. (Court of Appeal Opinion, pp. 3, 4, 14, 17.) The court correctly concluded that, "It is settled that state tort claims of wrongful discharge and fraud, which refer to alleged denials of employment benefit plans, are preempted by ERISA, even if ERISA is not mentioned. (*Johnson v. Trans World Airlines, Inc.*, 149 Cal.App.3d 518, 524 (1983); *Sorosky v. Burroughs Corp., supra,* 826 F.2d 800.)" (Court of Appeal Opinion, p. 6.)

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CONCLUSION

There is no conflict among the courts, and this is not a case of first impression. There simply is no valid reason to grant review herein. Accordingly, for the foregoing reasons, the Bank submits that the petition should be denied.

Dated: November 22, 1988

Respectfully submitted,

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